RED ROCK 4-WHEELERS

IBLA 83-99 Decided August 17, 1983

Appeal from a decision of the Utah State Director, Bureau of Land Management, designating 7,620 acres of inventory unit UT-060-138 as a wilderness study area.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act--Federal Land Policy and Management Act of 1976: Wilderness

   Sections 102(a)(5), 202(a), 202(f), and 309(e) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701(a)(5), 1712(a), 1712(f), and 1739(e) (1976), do not require that the policy and procedural clarifications of the Wilderness Inventory Handbook as expressed in OAD 78-61, Changes 2 and 3, be subject to public notice and review. OAD 78-61, Changes 2 and 3, are within the exception of section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), providing that interpretative rules, general statements of policy, or rules of agency organization procedure, or practice are not required to be promulgated as formal regulations.

2. Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act--Words and Phrases

   "Roadless." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained

> by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

APPEARANCES: George Schultz, president, Red Rock 4-Wheelers, Moab, Utah; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; James Catlin, conservation chairman, Salt Lake City, Utah, for intervenor Utah Chapter of the Sierra Club.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Red Rock 4-Wheelers appeals the decision of the Utah State Director, Bureau of Land Management (BLM), dated September 1, 1982, designating approximately 7,620 acres of the Negro Bill Canyon wilderness inventory unit (UT-060-138) as a wilderness study area (WSA) and identifying about 1,840 acres to be dropped from further consideration as wilderness. 1/ The reassessment which led to this decision was in response to a decision of this Board, Sierra Club, Utah Chapter, 62 IBLA 263 (1982), which remanded an earlier BLM decision. The Utah Chapter ofthe Sierra Club, the appellant in the earlier case, is an intervenor in this appeal. 2/

The State Director's review of UT-060-138 was made pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131(c) (1976). Following review of an area or island, the Secretary shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

The wilderness characteristics allued to in section 603(a) are defined in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected

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1/ The decision is published at 43 FR 40489 (Sept. 14, 1982).

2/ The Utah Chapter of the Sierra Club, as intervenor, supports BLM on the issues raised by appellant. It, however, proposes to expand the issues by challenging BLM's decision to drop 1,840 acres from further consideration as wilderness. Since it did not appeal the September BLM decision, but chose instead to intervene as to the issues raised by appellant, we believe it is appropriate to limit the scope of our decision to the issues raised by appellant.

> primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The review process undertaken by the State Office pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's decision in this case marks the end of the inventory phase of the review process and the beginning of the study phase for unit UT-060-138.

Appellant challenges the identification of 7,620 acres of the Negro Bill Canyon unit for wilderness study. Appellant specifically contends that Organic Act Directive (OAD) 78-61, Changes 2 and 3, issued July 3, 1979, and July 12, 1979, respectively, are not applicable or binding on wilderness inventories conducted under section 603(a) of FLPMA, supra, because Changes 2 and 3 altered the procedures contained in the Wilderness Inventory Handbook (WIH), without the public notice and review required by FLPMA in sections 102(a)(5), 202(a), 202(f), and 309(e). Consequently, appellant asserts that the use of these "invalid" amendments as a basis for the BLM decision is an error of law. Appellant further contends that BLM's decision was premised on a demonstrable error of fact. Appellant asserts that the area determined by BLM to be a WSA is not roadless and that BLM failed properly to inventory established roads that have been used continuously for over 20 years.

[1] We will address first the argument concerning OAD 78-61, Changes 2 and 3. In OAD 78-61, which is the WIH, BLM states that the handbook "establishes BLM policy and procedures for conducting wilderness inventories on public lands." It urges management at all levels in BLM to become familiar with the handbook since it contains important policy guidance. Field personnel were to use it for technical guidance in conducting the wilderness inventory. OAD 78-61, Changes 2 and 3, which are being challenged in this appeal, were characterized by BLM as designed for internal management purposes to provide all BLM personnel with policy clarification and supplemental guidance for certain aspects of the initial (Change 2) and intensive (Change 3) wilderness inventory process that was presented in the WIH.

Consequently, this Board has consistently held that the WIH and its amendments are guidelines that BLM clearly contemplated would be followed by all BLM personnel but that are not binding either on this Board or on the general public. Utah Wilderness Association, 72 IBLA 125, 128 (1983); Kennecott Corp., 66 IBLA 249, 258-59 (1982); Sierra Club, 61 IBLA 329, 334 (1982). The amendments, as such, are exempt from the Administrative Procedure Act (APA) 3/ requirement that agency pronouncements be promulgated as formal regulations, requiring public notice and comment, because they are within the exception of section 4(a) of the APA which provides: "Except when notice or hearing is required by statute, this subsection does not apply--(A) to

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3/ 5 U.S.C. § 553 (1976).

interpretative rules, general statements of policy, or rules of agency organization, procedure or practice * * *." 5 U.S.C. § 553(b)(A) (1976). See Kennecott Corp., supra at 258-59.

Appellant contends that notice or hearing concerning the amendments to the handbook was required by statute, specifically FLPMA, supra, at sections 102(a)(5), 202(a), 202(f), and 309(e). Since the handbook was subject to public notice, comment and hearings, appellant is challenging the validity of the additional guidelines and policies presented in OAD 78-61, Changes 2 and 3, because they were not subject to public notice and review. The Office of the Regional Solicitor, on behalf of BLM, contends that none of the FLPMA provisions cited by appellant require public notice and review of these statements of policy and interpretation of how BLM should proceed to conduct its wilderness inventory of the public lands mandated by section 603(a) of FLPMA. We agree.

Section 102(a)(5) of FLPMA, 4/ is a general statement of policy encouraging the Secretary to invoke rulemaking with public involvement. It imposes no legal requirement that policy statements developed under FLPMA involve public input. In any case, section 102(b) specifies that the policies of FLPMA "shall become effective only as specific statutory authority for their implementation is enacted by [FLPMA]." 43 U.S.C. § 1701(b) (1976). Section 603 of FLPMA, the statutory basis for the amendments at issue in this appeal, does not provide specific statutory authority for the implementation of rules or regulations to cover the wilderness inventory process. Appellant's allegation that section 102(a)(5) required OAD 78-61, Changes 2 and 3, to be subject to public notice or hearing is, therefore, incorrect.

Section 202(a) and (f), 43 U.S.C. § 1712(a) and (f) (1976), 5/ are part of Title II, the land use planning subchapter of FLPMA. The wilderness

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4/ "Section 102. (a) The Congress declares that it is the policy of the United States that--

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"(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking[.]" 43 U.S.C. § 1701(a)(5) (1976).

5/ "Section 202. (a) The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

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"(f) The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands." 43 U.S.C. § 1712(a), (f) (1976).

inventory task mandated by section 603 is not "land use planning" as that term is used in section 202. 6/ The Regional Solicitor's Office correctly asserts that the wilderness "inventory task involves comparing the public lands to certain set Congressional standards to see if they should be studied for possible inclusion in the wilderness system. Land-use planning will be relevant to the study of public lands which meet the Congressional wilderness study area (WSA) requirements * * *," but only after the inventory of public lands has been completed (Answer at 3-4). The public participation requirements of section 202(a) and (f), concern the involvement of the public at the planning stages. 7/ Those sections do not come into play in the wilderness inventory process.

The last FLPMA section which appellant asserts required public input for OAD 78-61, Changes 2 and 3, is section 309(e), 43 U.S.C. § 1739(e) (1976). 8/ This section is a general direction to the Secretary to establish procedures, by regulation, to achieve public input into decisions involving the public lands. As we discussed earlier, the Secretary has the discretion whether or not to promulgate certain policies and procedures by formal rule, unless otherwise mandated by statute. In accordance with section 309(e), the Secretary has promulgated land use planning and withdrawal regulations that require public input. 9/ Section 603 does not require the Secretary to promulgate regulations nor does section 309(e) require the Secretary to promulgate regulations on public participation procedures for the mandated wilderness inventory of the public lands under section 603(a).

There is no legal requirement imposed on the Secretary by sections 102(a)(5), 202(a), 202(f), or 309(e) of FLPMA that mandates that statements of policy such as those included in OAD 78-61, Changes 2 and 3, be subjected to public review and comment. The exception in the APA discussed earlier which provides that these policies and procedures need not be promulgated as formal regulations is thus applicable. 5 U.S.C. § 553(b) (1976).

[2] Appellant charges that roads exist within the WSA. Appellant's statement of reasons relies on a June 17, 1982, letter which appellant wrote to BLM about the existence of the alleged roads, and it refers to photographs of a route that appellant contends should have been recognized by BLM as a road. The definition of a "road" used by BLM in its field work is set forth

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6/ See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 5-6 (1976), for a discussion of "land use planning."
7/ In discussing the meaning of what became section 202(f) of FLPMA the House Report stated: "[T]he Secretary is directed to allow public involvement and to establish procedures for Federal, State, and local government and public participation in development of public land use plans and programs." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 7 (1976) (emphasis added).
8/ "Section 309. (e) In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands."
43 U.S.C. § 1739(e) (1976).
9/ See 43 CFR 1601.3; 43 CFR 2310.3-1.

in H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), and in the WIH at page 5: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."

As this Board held in Churchill County Board of Commissioners, 61 IBLA 370, 373 (1982) and National Outdoor Coalition, 59 IBLA 291, 298 (1981), the allegation that BLM should have recognized a route as a road must be supported by information about who improved and maintained the route by mechanical means and when such activities occurred. In the absence of such information we believe that BLM's determination that a vehicle route does not meet the definition of a road is entitled to great deference. Affidavits filed by appellant establish only that four-wheel drive vehicles and motorcycles can proceed upon alleged "roads" within the proposed WSA. Appellant's information, including the photographs, fails to show that the areas in question are improved and maintained by mechanical means. 10/ Neither the allegations set forth in appellant's statement of reasons nor the statements in the affidavits overcome the deference we accord to BLM in such matters.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

10/ Moreover, even if we were to find that the routes in question were "roads" within the wilderness definition of that term, the proper action would be the cherrystemming of those roads, not the reversal of the decision to designate the area as a WSA, as urged by appellant. See C & K Petroleum, 59 IBLA 301, 307 (1981).